Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1093

IN THE

Supreme Court of the United States

October Term, 1985

Shirley M. Ryniawec,

Appellant,

v.

THE HONORABLE CALLIE TSAPIS,
Judge of the Circuit Court of
Brooke County, et al,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE RULING OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

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42pp

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NO. 85-1093

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SHIRLEY M. RYNIAWEC,

Appellant,

vs.

HONORABLE CALLIE TSAPIS,
Judge of the Circuit Court
of Brooke County, and CONNIE
JEAN RYNIAWEC (EDDY),

Appellees.

MOTION TO DISMISS THE APPEAL
AND TO AFFIRM THE RULING OF THE
WEST VIRGINIA SUPREME COURT OF APPEALS

STATEMENT OF FACTS AND CASE

This Motion is brought on behalf of CONNIE JEAN RYNIAWEC (EDDY), who seeks custody of her infant child from Appellant, the child's paternal grandmother. Appellant was served with Notice of the original Petition for custody as Custodian of the child.

Appellant has since requested and been granted Intervenor status in this matter. The Serviceman, Michael Leroy Ryniawec, is the father of the child who is the subject of this custody proceeding and was Plaintiff in the original divorce action.

The Final Decree divorcing the Serviceman and Appellee was entered on July 14, 1983, in Brooke County, West Virginia. This was prior to the Serviceman's enlistment in the Armed Forces. The Divorce Decree provided, in part,

> "The Plaintiff [Michael Leroy Ryniawec] is a fit and proper person to have the care, custody, and control of the minor child as long as he is living at his mother's home; in the event he leaves his mother's home, the Court will review his circumstances at that time before continuing custody with him;"

Appellee filed her Petition seeking custody of her child on November 27,

1984, in the Circuit Court of Brooke County, West Virginia. Service was accomplished on the Serviceman by mailing copies of the Petition and Notice of Hearing to his Attorney of Record and to his last known address. The issue of the Stay of Proceedings provided in 50 U.S.C. App. §521 was immediately addressed by the Circuit Court of Brooke County, West Virginia, which had Counsel brief the question, and then issued its Memorandum of Opinion, dated January 18, 1985, stating in part

> "The Plaintiff, by Counsel, seeks a Stay of these Proceedings under the provisions of the Soldiers and Sailors Civil Relief Act. We have been given no information as to whether or not the Plaintiff can obtain leave to participate in a Hearing. The case goes beyond the parental rights of custody of their child. The child's rights and best interest must also be considered by the Court. This Court is of the

opinion that permanent custody should not be litigated at this time in the absence of the father. However, the Court will consider a temporary custody arrangement as between the paternal grandparents of the child and the mother.

"The Plaintiff knew that custody was granted to him only while he lived with his parents; he chose to join the Service in spite of that provision. This Court has a right to consider who should have custody of the child while he is in the Service. The Court is of the opinion that a Stay of these Proceedings should be denied and will schedule a Hearing regarding the fitness of the mother to have custody and what the best interests of the child dictates as to temporary custody while the father is in the Armed Services and cannot have the child with him. Plaintiff will therefore not be denied his right to permanent custody should he petition this Court for custody."

By Order entered June 12, 1985, the Circuit Court of Brooke County did

"Order that temporary custody of the infant child of the parties hereto, Angelina Marie Ryniawec, is hereby Ordered placed with her mother, Connie

> Jean Ryniawec (Eddy), 4746 Noble Street, Bellaire, Ohio, and therefore the previous Order of this Court in which custody of the infant child of the parties hereto was granted to Michael Leroy Ryniawec, the Plaintiff, is hereby modified..."

Moreover, the Serviceman has been in Brooke County, West Virginia, off and on, since September 2, 1985, in order to face unrelated criminal proceedings, and remains in Brooke County, West Virginia, to this day.

This proceeding has been active for sixteen (16) months and there has been no appearance by the Serviceman by pleading, by Counsel, in person, or otherwise. The Court therefore has no information that the Serviceman is attempting to obtain Leave to appear in Brooke County in this proceeding; that the Serviceman will be in Brooke County at or after a certain time in order to appear in this proceeding; or that there is any

termination date to the Stay requested.

Finally the Stay requested has been made by the Serviceman's mother and it would appear that she has adequately protected the Serviceman's interests in this regard.

ARGUMENT UPON THE MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

It is Appellee's position that the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. §521, is not properly invoked; that the lower Court considered whether the fact of military service materially affected the Serviceman's ability to defend this action and determined that it did not; and that the Circuit Court is free to proceed against the Appellant under 50 U.S.C., App. §524, without affecting the rights of the Serviceman, which was done.

This child custody proceeding is between Appellant, Grandmother, and Appellee, Mother. The Serviceman's property rights are not impaired; no one seeks a money judgment against him, support has not been requested. The Serviceman is a party to this action as an administrative convenience only so that the case can be identified.

The Appellant seeks to interpose the Stay provided by the Soldiers and Sailors Civil Relief Act in order to avoid the Circuit Court's original Divorce Order. The judicial discretion conferred on the trial Court regarding the Stay of Proceedings was the very heart of the policy of the act. Boone v. Lightner, 319, US 561, 63 SCt 1223, 87 L. Ed. 1587 (1943). In denying the Serviceman's request for a Stay, this Court noted that absence [of the Serviceman] may be a policy instead of a result

of military service, and discretion is vested in Courts to see that the immunities of the Soldiers and Sailors Civil Relief Act are not put to such unworthy use. Boone v. Lightner, 63 SCt at 1231.

In this case a mother seeks custody of her child from the paternal grandmother. The father is absent. West Virginia Circuit Courts may address the custody of minor children and alter any custody Order "as the circumstances of the parents or other proper person or persons and the benefit of the children may require". §48-2-15(e), West Virginia Code. West Virginia also recognizes that a parent has a natural right to custody of her child, Hammack v. Wise, 158 WV 343, 211 SE2d 118 (1975).

The Serviceman was present at his divorce proceeding and was aware of the Court's divorce decree. The Serviceman knew that upon enlistment he triggered

the mother's custody request. When granting the mother temporary custody, the Court acknowledged the importance of the Stay provided by the Soldiers and Sailors Civil Relief Act; as well as the right to proceed against other defendants not in the service; the fact that the Serviceman did not have custody of his child by virtue of his absence; and the importance of the Serviceman's right to petition for custody upon his return to Brooke County, West Virginia.

Lackey v. Lackey, 278 SE2d 811 (VA.1981), cited by Appellant, differs from the instant case in two important points. (1) Mr. Lackey obtained a Court Order transferring custody of his child to his parents while he was in the Service and overseas. In this case Mr. Ryniawec did not do this. (2) In Lackey, supra, a permanent change in

custody was requested. In this case, only a temporary custody award was granted pending the Serviceman's return and Petition.

The Circuit Court did not abuse its discretion and the Supreme Court of Appeals was correct in denying Appellant's request for a Rule in Prohibition because the Serviceman knew that the award of custody to him was conditional upon his remaining at home with his mother and yet he voluntarily enlisted in the Service, the Serviceman's rights have been fully protected by the Appellant, his mother, and the issue of the Stay provided by the Soldiers and Sailors Civil Relief Act has been addressed at each stage of these proceedings. The Serviceman has made no appearance in these proceedings in the sixteen months since the Petition has been filed, thus no Court knows the expected duration of

his service, whether he can obtain Leave, whether he has attempted to obtain Leave, nor when he will be in the area to appear in this proceeding. In fact, the Serviceman has been in the jurisdiction of the Circuit Court of Brooke County to face unrelated criminal charges and still has not appeared in this proceeding. Moreover, the Circuit Court specifically stated that it would not make an Order changing permanent custody but would only grant Appellee temporary custody. These circumstances demonstrate affirmatively that invocation of the Stay is dictated more by strategy than by the necessity of military service. The Circuit Court has considered the fact of military service and has ruled so that the Serviceman's rights are not materially affected. And the Circuit Court has found, consistent with West

Virginia Law, that the welfare of the child is paramount to any other issue.

CONCLUSION

For these reasons, Appellee respectfully requests that this Honorable Court dismiss the Petition for Appeal and affirm the Ruling of the West Virginia Supreme Court of Appeals permitting the Circuit Court of Brooke County, West Virginia, to consider Appellee's custody Petition.

Respectfully submitted,

PAUL T. CAMILLETTI

CAMILLETTI AND SACCO
30 Twelfth Street
Wheeling, West Virginia
26003
(304) 233-2541

ATTORNEY FOR APPELLEE

APPENDIX A

IN THE CIRCUIT COURT OF BROOKE COUNTY
WEST VIRGINIA

MICHAEL LEROY RYNIAWEC,

Plaintiff,

vs. CIVIL ACTION
NO. 82-C-294

CONNIE JEAN RYNIAWEC,

Defendant.

DIVORCE DECREE

On the 27th day of January, 1983, came the plaintiff, Michael Leroy Ryniawec, in person and by his attorney, Helen L. Jackson-Gillison, and as well came the defendant, in person and by her attorney, Kevin A. Stryker, pursuant to notice of hearing that this matter was to be brought on for final hearing.

WHEREUPON, in consideration of the attested Complaint alleging the existence of irreconcilable differences and an attested Answer admitting the existence of the same, and the testimony of the

parties, the Court was of the opinion that the plaintiff had met the grounds for the granting of a divorce based on the grounds of irreconcilable differences under the laws of the State of West Virginia;

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that:

1) The plaintiff is awarded a divorce from the defendant based on the grounds of irreconcilable differences;

2) The plaintiff is a fit and proper person to have the care, custody and control of the minor child as long as he is living at his mother's home; in the event he leaves his mother's home the Court will review his circumstances at that time before continuing custody with him;

3) The defendant shall be entitled to reasonable rights of visitation with the infant child subject to giving the

plaintiff twenty-four (24) hours notice of her intent to exercise her visitation rights;

It is further ORDERED, ADJUDGED and DECREED that:

4) The defendant waives permanently any rights she may have to alimony from the plaintiff. It is understood by the defendant that a waiver of alimony at this point in time will bar her from ever receiving alimony from the plaintiff;

5) Both the plaintiff and defendant shall be enjoined and restrained from interfering or molesting each other in their personal liberties and affairs;

6) The plaintiff shall pay the defendant's counsel the sum of Seven Hundred Fifty Dollars ($750.00) within sixty (60) days.

There being nothing further to be done herein, it is ORDERED that this case be placed among the causes ended.

ENTER this 14th day of July. 1983.

Callie Tsapis
JUDGE CALLIE TSAPIS

APPROVED BY:

Helen L. Jackson-Gillison
HELEN L. JACKSON-GILLISON,
Counsel for Plaintiff

Kevin A. Stryker
KEVIN A. STRYKER,
Counsel for Defendant

Entered in Civil Order
Book # 29 Page 841-848
JUL 14, 1983
Betty S. Rockwell
Clerk Circuit Court

APPENDIX B

IN THE CIRCUIT COURT OF BROOKE COUNTY,
WEST VIRGINIA

MICHAEL LEROY RYNIAWEC,

Plaintiff,

vs. CIVIL ACTION
NO. 82-C-294

CONNIE JEAN RYNIAWEC,
(EDDY),

Defendant.

MEMORANDUM OF OPINION

The parties hereto were divorced on January 27, 1983 and custody of the minor child of the parties, after a contested hearing on the issue, was granted to the Plaintiff "as long as he is living at his mother's home; in the event he leaves his mother's home the Court will review his circumstances at that time before continuing custody with him;"

The Defendant has now filed a Petition seeking a change of custody on

the basis that the said Plaintiff is now in the armed forces stationed in Germany and also complaining therein that his parents, with whom the child is living, have made it difficult for her to exercise visitation rights and she has had none since April of 1984.

The Plaintiff, by counsel, seeks a stay of these proceedings under the provisions of the Soldiers and Sailors Relief Act. We have been given no information as to whether or not the Plaintiff can obtain leave to participate in a Hearing.

This case goes beyond the parental rights of custody of their child. The child's rights and best interest must also be considered by the Court. This Court is of the opinion that permanent custody should not be litigated at this time in the absence of the father. However, the Court will consider a temporary

custody arrangement as between the paternal grandparents of the child and the mother.

The Plaintiff knew that custody was granted to him only while he lived with his parents; he chose to join the service in spite of that provision. This Court has a right to consider who should have custody of the child while he is in the service.

The Court is of the opinion that a stay of these proceedings should be denied, and will schedule a hearing regarding the fitness of the mother to have custody and what the best interest of the child dictates as to temporary custody while the father is in the armed services and cannot have the child with him. Plaintiff will, therefore, not be denied his right to permanent custody should he Petition this Court for custody.

This action is, therefore, scheduled for hearing on the Petition on the issue of temporary custody and visitation on February 13, 1985, at 9:00 o'clock, a.m.

Counsel for the Defendant may accordingly prepare an Order.

Dated this 18th day of January, 1985.

_____

Judge

APPENDIX C

IN THE CIRCUIT COURT OF BROOKE COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs. 84-F-118

MICHAEL RYNIAWEC,

Defendant.

JUDGMENT ORDER

On the 2nd day of December, 1985, came the State of West Virginia, by David B. Cross, Prosecuting Attorney for Brooke County, West Virginia, and as well came the Defendant, Michael Leroy Ryniawec, in person, and by Marc B. Chernenko, his Attorney. This matter having been set this date for trial, however, the Court was advised by counsel for the Defendant that a plea agreement had been reached as to the above-referenced indictment,

and proceeded to state the terms of the same on the record, said terms being as follows:

1. The Defendant will enter a plea of no contest to the misdemeanor charge of battery.

2. The Defendant will be sentenced to a one year term in the Brooke County jail, all of which would be suspended but seven days, for which he would be given credit, the Defendant having previously served that amount of time in the Brooke County jail and as well the Mount Holly, New Jersey jail.

3. The Defendant will serve two hundred fifty hours of community service work in a hospital at or near such military base as he may be stationed by the United States Army, which service work is to be approved by the probation officer of Brooke County.

4. That the Defendant pay restitution to the County Commission for those expenses incurred in his having been transported from Mount Holly, New Jersey to Brooke County, West Virginia, said restitution to be in an amount not to exceed Nine Hundred Forty-three Dollars Fourteen Cents ($943.14), and the particular amount to be determined through agreement of the Prosecuting Attorney and counsel for the Defendant inasmuch as certain questions were raised concerning the nature of certain of the specific expenses.

The Prosecuting Attorney then acknowledged that the terms of the plea agreement were as related by defense counsel.

The Court then proceeded to address the Defendant personally in open Court and advised him and determined that he understood the following:

1. The nature and elements of the charge of battery.

2. The Defendant's right to be represented by an attorney and the right to a court-appointed attorney in the event of indigency.

3. The right to plead not guilty, the right to a jury trial, the right to assistance of counsel during trial, the right to confront and cross-examine the witnesses against him, the right not to be compelled to incriminate himself, and the right to call witnesses on his behalf.

4. That if he pleads guilty, or nolo contendere, there will not be any further trial of any kind, so that by pleading guilty or nolo contendere, he waives the right to a trial on these charges.

5. That if he pleads guilty or nolo contendere, the Court may ask him questions about the events to which he

has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers, if untrue, may later be used against him and a prosecution for false swearing.

The Court, after determining that the plea is voluntary and not the result of force or threats or promises apart from the plea agreement or from his being under the influence of alcohol or drugs, inquired of the Defendant whether the willingness to plead nolo contendere resulted from prior discussions between the attorney for the State and defense counsel, and the Defendant replied in the affirmative.

The Court then inquired of the Defendant as to whether he was aware of and understood the terms of the plea agreement as recited by defense counsel and further inquired as to whether the Defendant was satisfied with the

representation of his interest in this matter by defense counsel, to both of which the Defendant replied in the affirmative.

After colloquy, the Court being satisfied that a plea could be entered by the Defendant, knowingly, intelligently, and voluntarily, the Court read the indictment to the Defendant and then called upon him to plead to the same regarding the lesser included misdemeanor offense of battery. Defendant then pleaded nolo contendere to the charge of battery, a lesser included offense of the indictment, and a misdemeanor.

After due consideration, it is further ORDERED that the Plea Agreement as related by defense counsel be accepted by the Court and the same be incorporated as the just judgment, sentence and disposition of the case. After determing that there is a factual basis for the plea,

it is then ORDERED and ADJUDGED that the Defendant, based upon his plea of nolo contendere, is convicted of the offense of battery, a misdemeanor, and it is further ORDERED and ADJUDGED as follows:

1. That the Defendant be sentenced to one year in the Brooke County jail, with all but the first seven days of said sentence being suspended, and further with the Defendant being given credit for the seven days having been previously served by him both in the State of West Virginia and as well the State of New Jersey.

2. The Defendant shall serve a period of probation for eighteen months and shall abide by all rules and regulations set by his probation officer who shall be James R. Lee, Chief Probation Officer of the First Judicial Circuit of West Virginia.

3. The Defendant shall serve two hundred fifty hours of community service

work at a hospital at or near that U.S. Army base at which the Defendant shall be stationed.

4. The Defendant shall provide written report upon request relating to his progress on the above community service work.

5. The Defendant shall make restitution to the Brooke County Commission of those expenses incurred by the County in transporting him from the State of New Jersey to Brooke County, said restitution being in an amount to be determined by agreement of counsel for the Defendant and as well the Prosecuting Attorney after review of all expenses submitted. In any event, the restitution shall have a maximum limit of Nine Hundred Forty-three Dollars Fourteen Cents ($943.14).

As further terms of the probation granted by the Court, it is ORDERED as

follows:

1. The Defendant shall not, during the term of his probation, violate any criminal law of this or any other state, or of the United States.

2. The Defendant shall not, during the term of his probation, leave the State without the consent of the Court which placed him on probation, however, in the event that the Defendant shall be stationed by the United States Army outside of this State or outside of the United States, this provision shall not apply.

3. The Defendant shall comply with the rules and regulations prescribed by the Court or by the Board of Probation and Parole, as the case may be, for his supervision by the probation officer.

4. The Defendant shall pay any fine assessed and the costs of the proceeding in such installments as the Court

may direct.

5. The Defendant shall not use or possess any controlled substances listed under the Uniform Controlled Substances Act of the West Virginia Code.

6. The Defendant shall not associate with any known or suspected drug users.

7. The Defendant is not permitted to use intoxicating beverages, liquors, beer, or to frequent places or establishments where either is sold, dispensed or used.

8. With the exception of any family member, the Defendant shall not associate with any person having a criminal record.

9. The Defendant shall be required to seek and maintain employment during the term of his probation.

10. The Defendant shall report immediately to the probation officer,

any change of employment, address, or telephone number.

11. The Defendant shall report to the probation officer one time per month on that form provided to him by the probation officer.

Curt Savage, the complaining witness herein, was present at the sentencing and indicated on the record that he concurred in the disposition of this case.

Accordingly, there being no further proceedings necessary in this matter, it is ORDERED that the bond previously posted by the Defendant be released and that this case be disposed of in accordance with this Order and the Defendant abide by the terms as set forth in this Order. It is further ORDERED that the Clerk transmit an attested copy of this Order to all counsel of record and as

well to James R. Lee, Chief Probation Officer for the First Judicial Circuit.

ENTER this 23d day of DECEMBER, 1985.

W. Craig Broadwater

W. CRAIG BROADWATER, Circuit Judge

APPROVED BY:

David B. Cross

DAVID B. CROSS
Prosecuting Attorney

Marc B. Chernenko

MARC B. CHERNENKO
Counsel for Defendant

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Betty S. Rockwell
Clerk, Circuit Court
Brooke County, West Virginia
By: Glenda Brooks (Deputy)

Entered in Criminal Order
Book # 9 Page 732 - on 736
DEC 23, 1985
Betty S. Rockwell
Clerk Circuit Court, Brooke County

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY M. RYNIAWEC,

Appellant,

vs.

HONORABLE CALLIE TSAPIS,
Judge of the Circuit Court
of Brooke County, and
CONNIE JEAN RYNIAWEC (EDDY),

Appellees.

AFFIDAVIT

STATE OF WEST VIRGINIA

COUNTY OF OHIO, TO-WIT:

Affiant, after being duly sworn, deposes and says as follows:

1. My name is Connie Britt.

2. I am the mother of Respondent CONNIE JEAN RYNIAWEC (EDDY) and the grandmother of the child, Angelina Marie Ryniawec.

3. I am personally acquainted with

Michael Ryniawec, the father of Angelina.

4. I have seen Michael Ryniawec in Brooke County, West Virginia, in the months of November and December, 1985, and in January, 1986.

5. I usually see him on a Friday, Saturday, or Sunday.

6. On a Sunday in early December, 1985, he came to my home to pick up his daughter, my granddaughter, Angelina, after a visitation.

7. On Sunday, January 5, 1986, I telephoned the residence of Shirley M. Ryniawec; the phone was answered by Michael Ryniawec, and at that time we discussed the possibility of Angelina visiting with me.

Further Affiant saith not.

Connie Britt
CONNIE BRITT

Taken, sworn to and subscribed before me this 14th day of January, 1986.

1986.

Paul T Camilletti

Notary Public of, in and for
Ohio County, West Virginia

My Commission expires:

June 6 1988

APPENDIX E

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY M. RYNIAWEC,

Appellant,

vs.

HONORABLE CALLIE TSAPIS,
Judge of the Circuit Court
of Brooke County, and CONNIE
JEAN RYNIAWEC, (EDDY),

Appellees.

AFFIDAVIT

STATE OF WEST VIRGINIA

COUNTY OF BROOKE, TO-WIT:

Affiant, after being duly sworn, deposes and says as follows:

1. My name is James Lee. I am the Probation Officer for Brooke County, West Virginia.

2. One of my Probationers is Michael Ryniawec.

3. This Probationer, Michael Ryniawec, is the father of Angelina Marie

Ryniawec, and was formerly married to Connie Jean Ryniawec.

4. I am advised by Michael Ryniawec that he is a member of the Armed Forces serving with the United States Army.

5. According to records in the Circuit Court of Brooke County, West Virginia, in a case styled State of West Virginia vs. Michael Leroy Ryniawec, Case No. 84-F-118, the Prosecuting Attorney for Brooke County, West Virginia, requested that Michael Ryniawec be returned to Brooke County to face charges in the above referenced case.

6. Pursuant to that request, Michael Ryniawec was returned to Fort Dix, New Jersey, from whence he waived extradition to Brooke County, West Virginia.

7. According to records in his criminal case, Michael Ryniawec received his warrant in Brooke County, West

Virginia, on September 2, 1985, at which time he posted Bond.

8. Michael Ryniawec appeared in Circuit Court to receive his indictment on September 13, 1985. At that time he was represented by Attorney Marc B. Chernenko.

9. Pursuant to a Plea Agreement, Michael Ryniawec entered his Nolo Contendere Plea to the reduced charge of Battery on December 2, 1985.

10. On December 2, 1985, I interviewed Michael Ryniawec for the purpose of beginning his probation file. At that time he listed his home address as P. O. Box 207, West Liberty, West Virginia. I am advised by the Probationer that he is still in this Country. He must notify me before he returns to active duty in West Germany. I have not yet been notified of that event.

Furtner Affiant saith not.

James R. Lee
JAMES LEE

Taken, sworn to and subscribed before me this 17th day of March, 1986.

Grace Keener
Notary Public of, in and for
Brooke County, West Virginia

My Commission expires:

June 14, 1989